No. 10972

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the Eastern District of Washington, Northern Division

Brief for the Appellant

ROBERTSON & SMITH,
By DEL CARY SMITH, JR.
Spokane & Eastern Bldg.,
Spokane, Washington
HAROLD M. GLEESON,
Sherwood Building,
Spokane, Washington,
Attorneys for Appellant.

No. 10972

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the Eastern District of Washington, Northern Division

Brief for the Appellant

ROBERTSON & SMITH,
By DEL CARY SMITH, JR.
Spokane & Eastern Bldg.,
Spokane, Washington

HAROLD M. GLEESON,
Sherwood Building,
Spokane, Washington,

Attorneys for Appellant.

SUBJECT INDEX OF MATTER IN BRIEF

TABLE OF CASES CITED

TABLE OF CASES—Continued

STATUTES CITED

TEXTBOOKS CITED

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellant George Clayton appeals from a judgment and commitment upon conviction under an indictment charging him, with certain others, with conspiracy and falsely pretending to be a United States officer in violation of Sections 76 and 88, Title 18, U. S. C. A. committed within the Eastern District of Washington, Northern Division.

STATEMENT OF THE CASE

This is a criminal action charging appellant, George Clayton, and others with conspiracy to extort money and narcotics from a physician by the technique of impersonation of a Federal narcotics agent. The co-defendants plead guilty at the time of the trial but were not sentenced at the time of the trial.

The principal questions involved are: first, a reference by the District Attorney in his argument to the jury to the background and action of one of the co-defendants, Wilma Shirley Doores, and to the background of the defendants involved, particularly of the appellant, which reference is claimed to be inflammatory and prejudicial; secondly, a direct reference by the District Attorney in his argument to the failure of the defendant on trial to call as a witness one of the co-defendants not on trial; and thirdly, the trial court's stressing and over-emphasizing in his instructions the

subjects of conspiracy and circumstantial evidence to the prejudice of the appellant.

A more complete statement of facts is as follows:

George Clayton and Wilma Shirley Doores were living in a common-law relationship in the outskirts of Spokane, Washington. The defendant Wilma Shirley Doores was commonly known as Shirley Doores. Shirley Doores to a very marked extent lived a life independent of that of her common-law husband, George Clayton, and carried on her own business and business transactions; George Clayton, in turn, carried on his business transactions independently of Shirley Doores. They apparently shared in the ownership of the home they occupied, title being at various times in the name of either one or the other. Shirley Doores was absent for long periods of time without accounting for her whereabouts or activities. She had one brother involved in this transaction, to-wit: Wesley Doores, commonly known as Bunny Doores.

Through Bunny or Wesley Doores, Shirley Doores formed an association with one Edward William Kelly for the purpose of extorting money and narcotic drugs from one Dr. E. H. Teed of Coeur d'Alene, Idaho, a practicing physician of that city from whom Shirley Doores had been making extensive purchases of narcotic drugs. He, the said Edward William Kelly, took upon himself to falsely act as an inspector and officer

of the narcotics division of the Treasury Department of the United States, and as such pretended character, he threatened to arrest Dr. Teed for unlawfully disposing of narcotic drugs to the said Shirley Doores. Shirley Doores, as her part of the conspiracy, was then to obtain money and drugs from Dr. Teed on the theory that she would be able to use such money and drugs to bribe the pretended narcotics agent and thus induce him not to arrest or institute prosecution against Dr. Teed. In connection with that transaction, Kelly and Shirley Doores did go to Coeur d'Alene to see Dr. Teed and did obtain several thousands of dollars from him and some narcotics.

The indictment was in five counts. The only count involving appellant was the conspiracy count, Count I., and then only to the extent that it is claimed he acted generally in an advisory capacity to the other conspirators and that he received a part of the moneys.

Wesley or Bunny Doores testified at length on behalf of the government, claiming personal knowledge of many of the transactions, and prior to the trial of the action, both the defendant, Edward William Kelly, and the defendant, Wilma Shirley Doores, pleaded guilty, but neither one was sentenced at the time of the trial, and in fact, they were not sentenced until following the conclusion of the trial.

Kelly testified at length for the Government, and Wilma Shirley Doores was called and asked one question only (T. of R. p. 363). The trial resulted in a verdict of guilty as to the appellant, George Clayton. During the course of the trial, the District Attorney made certain statements in his argument to the jury that were inflammatory and prejudicial to the defendants and these arguments are set forth in Assignment of Error No. 3 (T. of R. p. 514), and Assignment of Error No. 4 (T. of R. p. 516), and finally the District Attorney was permitted to argue to the jury over the objection and exception of the defendant and appellant, George Clayton, that the appellant had failed to call as a witness in his behalf an alleged co-conspirator, to-wit: Wilma Shirley Doores, a defendant in the same action but not on trial, which argument is set forth fully in Assignment of Error No. 5 (T. of R. p. 518).

The final question presented is raised in Assignment of Error No. 6 (T. of R. p. 519), when the trial court gave the jury additional instructions upon the subjects of conspiracy and circumstantial evidence at the request of the plaintiff and appellee and over the objecton of the defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the minds of the jurors such instructions and to weaken the instructions as given by the Court, to the prejudice of the defendant.

SPECIFICATIONS OF ERROR

Specification of Error No. 1. The District Court erred in overruling appellant's motion, made at the end of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy (T. of R. p. 513).

Specification of Error No. 2. The District Court erred in failing to grant appellant's motion, made at the conclusion of all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two constructions, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the appellant (T. of R. p. 513).

Specification of Error No. 3. That the Court erred in permitting the U. S. District Attorney over the objection and excepton of the defendant to argue as follows:

"Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son $2,000 * * *. It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an ex-

planation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

"Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

"The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

* * * * * * *

"Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

"Mr. Smith: This argument is outside the case, and I object to it.

"The Court: "I think it s perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

"Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed —and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her makeup, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

"Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

"The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

"Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

"I submit the verdict should be guilty.

"Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

"The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 514)

Specification of Error No. 4. The Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

"Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentons of this man Clayton and the arguments of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

"Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what

for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

"Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

"The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

"Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

"I submit the verdict should be guilty.

"Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

"The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 516)

Specification of Error No. 5. The District Court erred in permitting the United States District Attorney to comment in his argument to the jury, over the objection and exception of the defendant, that the defendant, George Clayton, failed to call as a witness in his behalf an alleged co-conspirator, Wilma Shirley Doores, a defendant in the same action but not on trial, which argument was as follows:

"Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores had pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doore's deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentons of this man Clayton and the argument of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from that testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in the case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 518)

Specification of Error No. 6. The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant, which was as follows:

"Any discussion of the instructions?

Mr. Connelly: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to consti-

tute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not prove the overt act was by this defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on circumstantial evidence excludes all the direct testimony of the conspiracy, because each time you say 'you will find the defendant not guilty,' if the case is based upon circumstantial evidence, which in this case it is not. It is a combination of direct evidence and circumstantial evdence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given.

(Whereupon, the following proceedings were

then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestions made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy beyond all reasonable doubt, as to the conspiracy showing the agreement, which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantal evidence.

The Government in this case is attempting to make its case both on the claim of direct evidence and circumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the

testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence." (T. of R. p. 519)

Specification of Error No. 5.

The District Court erred in permitting the United States District Attorney to comment in his argument to the jury, over he objection and exception of the defendant, that the defendant, George Clayton, failed to call as a witness in his behalf an alleged co-conspirator, Wilma Shirley Doores, a defendant in the same action but not on trial, which argument was as follows:

"Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of

the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentons of this man Clayton and the argument of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by cir-

cumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in the case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the vasis of the evidence submitted." (T. of R. p. 518)

SUMMARY OF ARGUMENT

Briefly summarized appellant's contention is this:

That the District Attorney was permitted to argue to the jury over the objection of the defendant that the defendant had failed to call as a witness in his own behalf a co-defendant, to-wit: Wilma Shirley Doores, who had entered a plea of guilty prior to the commencement of the trial, upon whom judgment had not been passed and who was not on trial, the witness being equally available.

Wilma Shirley Doores, commonly called Shirley Doores, was one of three co-defendants. She and defendant Kelly pleaded guilty prior to the commencement of the trial, Kelly testifying in behalf of the Government. Neither defendant Shirley Doores nor defendant Kelly was sentenced until after the trial, so that on the trial of appellant Clayton, Shirley Doores was an alleged co-conspirator and alleged co-defendant not on trial (T. of R. pp. 12 and 13). In the argument to the jury, the Government's attorney, Mr. Connelly, was permitted to argue, over the objection of appellant, that if the contentions of the appellant Clayton were true, all he had to do was place the co-defendant, Shirley Doores, on the witness stand, and he repeatedly called attention to the fact that the appellant had not placed this co-defendant on the stand, saying as follows:

"Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the argument of his counsel are true, the answer to all of it would be

a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here." (T. of R. p. 518)

Naturally this argument was highly prejudicial. The attention of the jury was dramatically called to the importance of her testimony and of course the jury was asked to indulge in the presumption that the appellant did not dare call her because if she testified she would involve him in the conspiracy.

The general rule that if a defendant has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates a presumption that the testimony, if produced, would be unfavorable, has no application to the nonproduction of co-defendants.

The defendant, Shirley Doores, could not be compelled to testify by either the appellant or the government if she stood on her constitutional privilege. Nei-

ther the Government nor the appellant had any means of knowing in advance what she would do. She was called by the Government for one question (T. of R. p. 363), and answered but one question, to the effect that her name was Shirley Doores and she was not married to the appellant, George Clayton. She was questioned in the absence of the jury by the Court and counsel (T. of R. pp. 360-363) and gave every indication then that she was going to refuse to answer questions; she then promptly answered the question put to her, but still there was no assurance to either the Government or appellant that she would answer any further questions.

She said (T. of R. p. 362): "I will not testify, then.

"The Court: You will not answer the question?

"Shirley Doores: No, not right now."

If the appellant had placed her on the stand and she had refused to testify, this refusal might have been construed by the jury to the appellant's disfavor. As far as the record discloses, Shirley Doores was no more available or accessible to one party than to the other. Therefore, the exception to the general rule that no presumption arises where witnesses are equally accessible or available has its counterpart in this case where she was not available really to either party as a witness since she could not be compelled to testify by either party, and so the jury should not have been permitted

to indulge in any presumption that she would have testified unfavorably to the appellant.

The Court appreciated this, for he says in part in his opinion (T. of R. p. 22): "I assume that my failure to instruct the jury to disregard the argument concerning the inference (that the testimony if produced would be unfavorable to appellant) is but tantamount to an affirmative instruction explaining the inference."

In

Hopkins v. State, 146 Pac. 917.

where several defendants were jointly charged with pandering and upon the separate trial of the defendant Hopkins, the prosecuting attorney was permitted to comment on the failure of the defendant on trial to introduce as witnesses in his behalf co-defendants not on trial, and the Court in discussing the matter calls attention to the fact that a co-defendant not on trial, of course, could not be compelled to testify by either party. The court said in part as follows:

> "The county attorney and his assistant, in using the language above quoted, misstated the law, and such statements are contrary to the spirit of the law, which seeks, by well-established rules, to prevent the possibility of prejudice. The language used conveys the idea, and was intended to convey the idea, that the defendant on trial had it in his power to compel each of his co-defendants, whether willing or unwilling, to testify in his behalf. That this language was prejudicial to the defendant cannot be doubted. The general rule that, if a defendant

has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates the presumption that the testimony, if produced, would be unfavorable, and is a circumstance against him, has no application to the nonproduction of codefendants. If the defendant had called his codefendants as witnesses in his behalf, they could not have been compelled to testify, and, if called, they had then refused to testify, this might have been construed by the jury to the defendant's disadvantage. * * *

"Under the constitutional and statutory provisions, no presumption could arise from the failure of the defendant on trial to call his codefendants as witnesses in his behalf, and the jury should have been left to try the issue upon the evidence introduced. The court, by refusing to sustain the objections to the improper remarks, and in refusing to instruct the jury that, under the law, the defendant had no more right than the state had to call his codefendants as witnesses, and that his failure to call certain codefendants as witnesses should create no presumption against him, and the court's failure to direct the jury to disregard such improper remarks as not within the limits of legitimate argument, gave the jury to understand that they might properly and lawfully consider the same, all of which was manifestly prejudicial to the substantial rights of the defendant."

To the same effect see

Duncan v. State, 2 Pac. (2d) 285;

Abrams v. State, 170 N. E. 188;

Hancock v. State, 241 Pac. 1108;

United States v. Laudani, 134 Fed. (2d) 847;

Moyer v. United States (Ninth Circuit), 78 Fed. (2d) 624-630.

In

Abrams v. State, 170 N. E. 188, *supra,*

an attorney was tried for subornation of perjury, being charged with procuring one Abraham Goldman to commit perjury in a divorce case. Goldman had apparently been found guilty of the offense of committing perjury in the same case but his testimony was not in the case at bar and he was not called as a witness by either the state or the defendant; and then, in his argument to the jury, the prosecuting attorney was permitted to make a raher vicious attack upon the defendant's case because he had not placed Goldman on the witness stand, intimating that the defendant did not do it on the knowledge that Goldman would testify that he was suborned by Abrams to commit the crime of perjury, the inference that the government's attorney in this case left with the jury. The court said in part:

> "* * * 'Why did not the defense put him on the witness stand?' and made a rather vicious attack upon the defendant's case because defendant did not place Goldman upon the witness stand, and intimated, as already stated, that the defendant did not do it because of the knowledge that he would testify that he was suborned by Abrams to commit the crime of perjury. Well, perhaps the knowledge of what Goldman would testify to could just as easily be ascertained by the state as by the defense, and if Goldman would have testified to that which

> would convict Abrams, if a witness for the defense, we do not see why the state did not use him for the purpose of convicting Abrams; and the argument, under the circumstances, was highly improper. It was not for the defendant to prove himself innocent of the crime, and he need not put the witness upon the stand, to be subjected to cross-examination of the prosecutor, unless the state had made a case irrespective of that witness, and then it would be only a question of judgment on the part of the trial lawyer. We think the conduct of the prosecutor in the argument of this case was not warranted and was misconduct."

In

> *Moyer v. United States*, 78 F. (2d) 625 (9th Circuit),

a conspiracy case, the Court instructed the jury that there was testimony that at least one or two of the other conspirators (and co-defendants) were present in court, and that the rule was that when any witness who knows the facts is available and not called to testify, then the jury might assume that such witness if called would testify against the party who should have called him. This, without advising the jury whether it is the duty of the government or the defendant to call other defendants who had pled guilty and were not on trial. There was only one of the defendants not on trial available as a witness who had not been called. This was a man named Grade. The Court said, in part, as follows:

> "Unquestionably Grade could testify whether or not he was present at a conversation or conversa-

tions with defendant Moyer on or about February 21. He had interposed a plea of guilty to the conspiracy charge. He had a right to remain silent respecting the facts of the case whether called upon to make a statement by either the prosecution or defense, unless called as a witness. The instruction left to the jury to determine whether he should have been called as a witness and by whom. They could have determined that if the defendant was testifying truthfully he should have called him to testify, and as he did not call him they could assume his testimony would not be in accord with that of Moyer. The effect would be that the jury could and might assume that if called as a witness Grade would corroborate the testimony of Pache. The rule we think should not be applied in the case of one who might be called as a witness who is a co-defendant and has entered a plea of guilty, and as to whom sentence has not been imposed."

We submit that the comment of the Government's attorney was improper and prejudicial and that under the authorities the judgment of conviction herein should be set aside.

SPECIFICATION OF ERRORS NOS. 3 AND 4 CONSIDERED TOGETHER

Specification of Error No. 3.

That the Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son $2,000 * * *. It is not a story which can be con-

sidered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

* * * * * * *

Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he

gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in this case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

Specification of Error No. 4.

That the Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the arguments of

his counsel ar etrue, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quite his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he

gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

SUMMARY OF ARGUMENT

These two assignments are both directed against prejudicial matters and matters not in evidence argued to the jury by the Government's attorney, particularly statements that a co-conspirator, Shirley Doores, admitted her guilt, that she didn't lie for anyone, that "You are dealing with people of the underworld. Don't forget that for a moment." That "Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties."

ARGUMENT

The United States District Attorney, Mr. Connelly, over the objection of the defendant and appellant, went outside of the record and argued matters not contained

in the evidence and matters that were highly prejudicial to the defendant and which must have had an effect on the minds of the jurors, particularly when considered with the other assignments of error argued in this cause. For example, without any evidence to support it, the Government's attorney referred to a co-conspirator, Kelly, not on trial but who had pled guilty before the trial and testified on behalf of the Government:

"Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper." (T. of R. pp. 496 and 497)

The defendant had a right to show, of course, that Kelly's sentence had not yet been passed. It was obvious that he was seeking some favor or some additional consideration when his sentence was passed, and it was a matter entirely proper to bring before the jury. But the argument set forth above was clearly outside the record. There was never any evidence to support it, and, of course, it was highly prejudicial as being in-

tended to offset the natural assumption that the jury would have that the man Kelly was expecting some favor.

Again Mr. Connelly, the Government's attorney, in his argument referring to Shirley Doores, another co-defendant not on trial but who had pled guilty and was awaiting sentence, stated as follows:

"Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit." (T. of R. p. 498)

The Government's attorney repeated in another part of his argument that the co-defendant, Shirley Doores, did not and she would not lie for anybody, all of which statements were properly objected to. This was in the closing remarks of the Government's attorney when he said as follows:

"Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all these circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that $1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 498)

These remarks were properly objected to, but the Court permitted them, and thus the jury was left with the final impression that here was a witness the defendant had failed to put on the stand because she wouldn't lie to anybody about anything. The Court overruled the objection and immediately began instructing the jury. These remarks couldn't have been in a position more prejudicial to the defendant. The infer-

ence obviously was the appellant was afraid of her because she would tell the truth and the truth would convict him.

Now, there is no testimony of any kind in the record that either the Government or anyone else could point out that would warrant such a statement on the part of the Government's attorney in his argument. The Government did not have too much confidence in Shirley Doores as a witness because when the Government put her on the stand, she was asked only one question as to whether she had ever been married to appellant. There was absolutely no evidence to support the Government's attorney's comment. It couldn't be inferred from anything before the Court, and of course, there was no testimony of any kind to support it, and the constant reiteration that Shirley would not lie must have had a profound effect on the jury. These remarks were something that the defendant could not combat in any way, save by objection to the argument. They were a part of the Government's closing argument. The prejudice created by such remarks is so obvious that merely to call attention to them would seem to be sufficient. There is an excellent discussion sustaining appellant's contention in this respect in Wigmore on Evidence, Third Editon, Volume Six, Section 1806.

The further implication of the argument is that appellant had attempted to prevail upon Shirley Doores

to testify in his behalf and that she had refused to lie for him. Such an implication is entirely outside of the facts in this case and highly prejudicial because it indicates that the Government's attorney was in possession of facts not disclosed by the evidence indicating appellant had attempted unsuccessfully to suborn perjury. There is no suggestion that defendant, Shirley Doores, was ever approached either to testify or not to testify in appellant's behalf, and to inject forcibly into the closing sentence of the Government's concluding argument such a thought is to place upon appellant a burden which we feel the law does not contemplate or approve.

Again in his argument (T. of R. p. 498), the Government's attorney argued that the jury were dealing with people of the underworld and not to forget it for a moment, after just having referred to the appellant's mother's testimony, there being no evidence that she had any connection with the underworld or anything to do with it. The argument excepted to is as follows:

"Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son $2,000 * * *. It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or

whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement." (T. of R. p. 496)

It will be noted that the only objection the Court sustained was to the last sentence and not to the statement that they, the jury, were dealing with people of the underworld.

The combined effect of these inflammatory and prejudicial remarks is such that it could not have but affected the jury and influenced their verdict, particularly when consideration is given the other assignments of error.

Specifications of Error Nos. 1 and 2.

Specification of Error No. 1. The District Court erred in overruling appellant's motion, made at the end

of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy (T. of R. p. 513).

Specifications of Error No. 2. The District Court erred in failing to grant appellant's motion, made at the conclusion of all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two considerations, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the appellant (T. of R. p. 513).

The rule is well established in the Federal Courts that if the evidence is as consistent with innocence as with guilt, it is insufficient to sustain a conviction.

The Circuit Court for the Third Circuit says in *Yusem v. U. S.*, 8 Fed. (2d) 6:

> "When all the facts are considered, we are unable to reach any other conclusion than that the statement showed nothing more than a possible carelessness, and not a scheme and artifice knowingly and wilfully devised with intent to defraud. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury

to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' Hart v. United States, 8 Fed. 799, 808, 28 C. C. A. 612; Union Pacific Coal Co. v. United States, 173 Fed. 737, 70, 97 C. C. A. 78; Wright v. United States, 227 Fed. 855, 857, 142 C. C. A. 379; Joseph Wiener et al., v. United States (C. C. A.) 282 Fed. 799, 801."

In *Edwards v. U. S.*, 7 Fed. (2d) 357, the Eighth Circuit said:

"If the evidence, taken as a whole, is as consistent with innocence as with guilt, then the conviction should not be sustained. In Wright v. United States, 227 Fed. 855, 857, 142 C. C. A. 379, 381, speaking of the defendant, this court said: 'The legal presumption was that he was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.'

"See, also:

Wiener et al. v. United States (C. C. A.), 282 Fed. 799;

Turinetti v. United States (C. C. A.), 2 Fed. (2d) 15."

Copeland, et al., v. U. S. (C. C. A.), 90 Fed. (2d) 78;

Kassin v. U. S., 87 Fed. (2d) 183.

Appellant was found guilty by the verdict of the jury of count one of the indictment which contained five counts (T. of R. Vol. 1, p. 13). In only one of the overt acts in furtherance of the conspiracy is appellant named, to-wit: overt act eleven (T. of R. Vol. 1, p. 7).

It is charged that between April 9, 1944, and May 25, 1944, the defendant, Wilma Shirley Doores gave to the defendant, George Clayton, approximately $3000.00 in cash, which he knew had been unlawfully received from Dr. E. H. Teed of Coeur d'Alene by the defendant, Wilma Shirley Doores, on the pretention that she, Wilma Shirley Doores, could prevent a purported narcotics inspector, impersonated by defendant Edward William Kelly, from arresting the doctor for unlawfully disposing of narcotics.

The evidence introduced by the Government took a very wide range, and although the defendants, Wilma Shirley Doores and Edward William Kelly, had pleaded guilty before the commencement of the trial, it is difficult to imagine how the Government could have introduced more proof against *them* had they actually been on trial.

Giving the testimony its full weight against the ap-

pellant, it amounts only to this: Appellant and Shirley Doores occupied the same dwelling house, living together in a relationship somewhat akin to that of a common law husband and wife, although the defendant, Shirley Doores, did not habitually go by appellant's surname.

Defendant, Shirley Doores' brother, Bunny Doores, after serving a term in the Washington State Penitentiary, had made his home with his sister and appellant. Through Bunny Doores, Shirley became acquainted with defendant, Kelly, a drifter who frequented pool halls and card rooms.

Beginning in December of 1943, Shirley had been securing narcotics from Dr. E. H. Teed of Coeur d'Alene. The narcotic prescriptions (plaintiff's exhibits 1 to 16) with the exception of plaintiff's exhibits 1 and 2, were issued in the name of Mike Sanders (T. of R. Vol. 1, pp. 37-53).

At a dinner in appellant's home at which it is claimed appellant was present, Defendant Shirley Doores suggested to Bunny Doores and defendant Kelly, that she "had enough on this doctor for the sale of narcotics" to get some money from him (T. of R. Vol. 1, p. 103).

It is apparent from the testimony of Defendant Kelly that if appellant Clayton was present as claimed, he had no part in originating the scheme and was at most a bystander or onlooker.

It is to be further noted that the testimony of defendant Kelly and Wesley "Bunny" Doores is flatly contradictory as to who originated the scheme.

(Testimony of Edward William Kelly)

"Q. Shirley brought up this matter about some doctor at Coeur d'Alene? A. Yes, sir.

Q. And Shirley spoke about the fact he would be an easy guy to get some money out of? A. That is right.

Q. And you and Bunny were both sitting there and heard it? (40) A. Yes, sir.

Q. And Shirley mentioned the fact that you could impersonate a federal officer or narcotic agent?

A. She didn't say I could. She asked if I would.

Q. Shirley asked you if you would?

A. Yes, sir.

" Q. Nothing was said about credentials there, was there?

A. Not a word." (T. of R. Vol. 1, p. 131)
(Testimony of Wesley Doores)

"Q. Tell us anything that George Clayton said out there with reference to this doctor at Coeur d'Alene during that evening at any time.

A. Well, after dinner out there, we was talking, and George said he had a good score at Coeur d'Alene if he could get one of us to go on it, and Kelly asked what it was, and George Clayton ex-

plained that Shirley had been getting prescriptions from Dr. Teed at Coeur d'Alene, and he had been writing them in a fictitious name, and if some one would impersonate a federal man he could take the doc for some money, and he wanted me to go over and I wouldn't go, and Kelly asked what he thought the doc would come up with, and he told him, oh, $800 or $1000, somewhere (51) around there, I don't remember the exact amount, and Kelly asked him if he thought there would be any trouble, and George told him no, there wouldn't be any, and so Kelly agreed to go over there.

Q. What, if anything, was said by any of you as to how this transaction would be carried out and who said it, as you recall?

A. George went on to explain to Kelly, at the same time after Kelly consented to go, he would drive him over, and Shirley was to go up to the doc's office and Kelly would come in a few minutes later, and Shirley would see Kelly and tell the doc that was a federal man in the waiting room." (T. of R. Vol. 1, 140)

Manifestly either one or the other or both of these two key witnesses for the Government was testifying falsely. We realize that ordinarily conflicts in the testimony are for the jury, but in a case of this kind where the evidence discloses that appellant took no part in any of the overt acts except to allegedly receive a sum of money from his common-law wife after it had been extorted by the others, we believe the appellate court should scan with meticulous care the testimony of admitted accomplices, and if glaring contradictions are detected, as here, this court should hold as was stated

in *Orras v. U. S.*, 67 F. (2d) 463, "manifest injustice has been done to a defendant."

Without the testimony of Kelly and Doores, the Government did not produce sufficient evidence to sustain the conviction, upon purely circumstantial evidence.

After the initial meeting and early the next morning, defendant Shirley Doores, and defendant Kelly, took a bus to Coeur d'Alene where they proceeded to carry out the scheme to extort money and narcotics from Dr. Teed upon threats of arrest and prosecution. Upon their return that afternoon, defendant Shirley Doores informed Kelly and Bunny Doores that she only received $300.00. She gave Bunny $80.00 and gave Kelly $100.00; no mention being made of Clayton in the division of the spoils (T. of R. Vol. 1, p. 145).

It is significant that the money was divided approximately three ways between defendant Shirley Doores, defendant Kelly and Wesley Doores, appellant receiving no part of the proceeds. This point had particular significance to the trial court who asked the witness Wesley Doores (T. of R. Vol. 1, p. 146) "what he had done to cut in on this."

Throughout the testimony of Wesley Doores, it is apparent that he is making a studied effort to interject into the case the name of appellant Clayton. Many facts and circumstances to which he testified under oath and

which should have been equally within the knowledge of defendant Kelly were not testified to by Kelly. The explanation of his animosity toward appellant is disclosed in the testimony of his brother, Robert Doores (T. of R. Vol. 2, pp. 471-8).

In his warped mind he believed that appellant had kept defendant Kelly and himself from getting an equal share with defendant Shirley Doores of the money extorted from Dr. Teed. He admitted receiving $80.00 that he knew was extorted from Dr. Teed; he admitted impersonating Mike Sanders on the long distance telephone, and it is incomprehensible to anyone reading the record in this case why he also was not indicted.

The Government offered evidence as to deposits in appellant's bank account made during the time of the alleged conspiracy by which it sought to establish appellant received unusual sums of money, thereby giving rise to the suspicion that defendant Shirley Doores had given it to him.

The evidence shows that on February 4, 1944, appellant Clayton conveyed to Defendant Shirley Doores the real property in which the parties lived in consideration of a diamond ring valued at $3,000.00 (Defendant's Exhibit "D") T. of R. Vol. 1, p. 84).

On the 8th day of May, 1944, Shirley Doores conveyed the same property by Quitclaim Deed to appellant Clay-

ton in consideration of $3,000.00 (Defendant's Exhibit "E") (T. of R. Vol. 1, p. 86).

On May 16, 1944, appellant Clayton reconveyed the same property to Shirley Doores in consideration of $3,000.00, and appellant testified that he received $1,250.00 and was to receive the balance later which was prevented by the arrest of defendant Doores.

The bank deposits in appellant's name and the real estate transactions are as consistent with innocence as with guilt, and in the light of the explanation offered by appellant and the testimony of witness Deckelman (T. of R. Vol. 2, p. 396), and his mother as to money which she had loaned him (T. of R. Vol. 2, p. 465), the circumstantial evidence against appellant evaporates.

We respectfully submit that the facts were wholly insufficient to justify the Court in permitting the jury to speculate as to whether appellant was a member of the conspiracy charged in the indictment. We believe this Court will not allow a conviction to rest upon the feeble circumstances elicited supported as they were only by the unsatisfactory and contradictory testimony of defendant Kelly and Bunny Doores.

Specification of Error No. 6.

The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over

the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant, which was as follows:

"Any discussion of the instructions?

Mr. Connelly: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to constitute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not have to prove the overt act was by tihs defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on cir-

cumstantial evidence excludes all the direct testimony of the conspiracy, because each time you say 'you will find the defendant not guilty,' if the case is based upon circumstantial evidence, which in this case it is not. It is a combination of direct evidence and circumstantial evidence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given.

(Whereupon, the following proceedings were then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestion made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy beyond all reasonable doubt, as to the conspiracy showing the agreement,

which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantial evidence.

The Government n this case is attempting to make its case both on the claim of direct evidence and circumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence." (T. of R. p. 519)

The jury had already been fully instructed upon the general tests which they should employ in weighing the testimony of witnesses and had been particularly instructed upon the subjects of accomplice and prior conviction of crime (T. of R. Vol. 2, 502-4).

The effect of the additional instruction hereinbefore quoted, made at the suggestion of the District Attorney, served to forcibly direct the jury's attention to witnesses Wesley Doores and Edward Kelly by name. The court specifically mentioned that under the testimony of Wesley Doores and Edward Kelly, the Government contended it had direct evidence of the defendant having participated in the conspiracy. Such a charge coming as it did at the conclusion of the case served to give to the testimony of these witnesses undue prominence and to over-emphasize its importance in the case. Had the Court again referred to the fact that these witnesses were admitted accomplices, and their testimony for that reason should be weighed with caution, much of the over-emphasis would have been eliminated. However, the Court did not do this, but merely referred in a general way to the instructions already given concerning the tests to be used in testing the testimony of such witnesses.

Cases are numerous in which the Courts have refused to give requested instructions which would only tend to accentuate and give undue prominence to what,

after all, is but one of many circumstances in evidence, and the Circuit Court has repeatedly held that the refusal of such requests did not constitute error.

See

Bough v. U. S. (9th Circuit), 27 Fed. (2d) 257;

Marron v. U. S. (9th Circuit), 8 Fed. (2d) 251.

In this instance it is the Government who requested the Court to accentuate and emphasize the testimony of defendant Kelly and Wesley Doores.

We submit that it was error for the Court to accede to the District Attorney's request in this manner.

CONCLUSION

We respectfully submit the trial court should have granted appellant's motion for a directed verdict, and that in any event he is entitled to a new trial on account of the many errors to his prejudice which the record discloses.

Respectfully submitted,

ROBERTSON & SMITH,
By DEL CARY SMITH, JR.
HAROLD M. GLEESON,

Attorneys for Appellant.